FILED
APR 24 1942
CHARLES ELMORE CROPLEY
CLERK

In The
SUPREME COURT OF THE UNITED STATES

October Term 1941.
No. 1174

WARDNER G. SCOTT, STATE ENGINEER, AND HEAD OF THE DEPARTMENT OF ROADS AND IRRIGATION OF THE STATE OF NEBRASKA;

ROBERT H. WILLIS, CHIEF OF THE BUREAU OF IRRIGATION, WATER POWER AND DRAINAGE, DEPARTMENT OF ROADS AND IRRIGATION OF THE STATE OF NEBRASKA, PETITIONERS,

V.

UNITED STATES OF AMERICA;
FARMERS IRRIGATION DISTRICT, A PUBLIC CORPORATION OF NEBRASKA;

LEO DANIELS, OTTO JUERGENS AND JAMES PICKERING, DIRECTORS OF THE FARMERS IRRIGATION DISTRICT AND E. O. DAGGETT, MANAGER OF THE FARMERS IFRIGATION DISTRICT;

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

WALTER R. JOHNSON, Attorney General of Nebraska,
JOHN L. RIDDELL, Assistant Attorney General of Nebraska,
PAUL F. GOOD, Special Counsel,
Attorneys for Petitioners.

WEIDNER-HEIDEMAN CO., Law Briefs, Lincoln, Neb.

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LEO DANIELS, OTTO JUERGENS AND JAMES PICKERING, DIRECTORS OF THE FARMERS IRRIGATION DISTRICT AND E. O. DAGGETT, MANAGER OF THE FARMERS IRRIGATION DISTRICT;

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, RESPONDENTS.

PETITION FOR WRIT OF CERTIOARARI.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, the State Irrigation Authorities of the State of Nebraska, respectfully present this their petition for review on writ of certiorari of a decision

of the United States Circuit Court of Appeals for the Eighth Circuit rendered December 23, 1941 (Record, p. 729, 124 Fed. [2d] 850), rehearing denied January 28, 1942 (Record, p. 769, 124 Fed. [2d] 863), in the case entitled *United States* v. *Tilley*. The petitioner, Wardner G. Scott, being successor in office to A. C. Tilley, appellee in the United States Circuit Court of Appeals, has been substituted as a party in this cause for the said A. C. Tilley.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. The matter involved is a controversy between the United States of America on the one hand and the State Irrigation Authorities of the State of Nebraska on the other, relating to the control and distribution of the waters flowing in certain drainage ditches in the State of Nebraska. Such waters are for the most part seepage, return flow, or drainage coming from irrigation practiced by citizens of the State of Nebraska upon Nebraska lands in the Pathfinder Irrigation District with waters diverted in the State of Wyoming and conducted to said lands by a canal originally constructed by the United States under the authority of the United States Reclamation Act (Act of June 17, 1902), 32 Statutes at Large, 388 ff. The suit was commenced by the United States in the District Court of the United States, District of Nebraska, North Platte Division, on November 20, 1937, as an injunction action. In so far as pertinent to the matters raised in this petition for certiorari, the petition of the United States was for an injunction to compel the State Irrigation Authorities of the State of Nebraska to make the drainage waters available for the lands under the Northport Irrigation District, an

irrigation project watered through another canal constructed by the United States under the same Act of Congress. The contention of the United States was that these waters were under United States control. The contention of the irrigation officers of the State of Nebraska, petitioners herein, was that the said waters were public waters of the State of Nebraska, which should be supplied to Nebraska water users who had priorities senior to the priority of the Northport and who then required the water, since there was not enough water available at the time complained of for an adequate supply to those canals which were senior to the Northport. In addition, the petitioners raised as defenses certain equitable grounds hereinafter discussed.

2. In the State of Nebraska waters are distributed and administered on the basis of priority of appropriation, the waters of the state being dedicated to the people of the state for beneficial purposes (Constitution, Art. 15, Secs. 5, 6 and 7; C. S. Neb. 1929, Chapter 46, Art. 5, especially Sections 46-501 to 46-506).

3. The Tri-State Canal is operated by the Farmers Irrigation District, and carries water for lands under two appropriations both duly adjudicated by the proper authorities of the State of Nebraska, one having priority date of September 16, 1887, for 905 cubic feet per second and the other having priority date of April 14, 1902 for 52 cubic feet per second (Record, p. 237). These appropriations have been the subject of some controversy, but in three Nebraska cases have been established as to priority date and amount, namely: *Farmers Irrigation District* v. *Frank*, 72 Neb. 136, 100 N. W. 286; *Enterprise Irrigation District* v. *Tri-State Land Company*, 92 Neb. 121, 138 N. W. 171 (error proceedings in this

court dismissed, 243 U. S. 157, 61 Law Ed. 644, 37 S. C. 318); *State ex rel Sorensen* v. *Mitchell Irrigation District*, 121 Neb. 586, 262 N. W. 543 (Certiorari denied, 297 U. S. 723, 80 Law Ed. 1007, 56 S. C. 667). In addition the Farmers Irrigation District carries through the Tri-State Canal waters for the Northport Irrigation District under a contract dated August 10, 1915, to which contract the parties were the United States, the Tri-State Land Company and Farmers Irrigation District (Record, p. 238). The Northport Canal, being physically an extension of the Tri-State Canal, was constructed following the date of that contract, and in the year 1926 the operation of the Northport Canal was turned over to the Northport Irrigation District, a public corporation organized and existing under the laws of the State of Nebraska.

4. The drains and canals in question are shown on the maps, Exhibit 2 (Record, p. 779), and Exhibit 43 (Record, p. 781). Reference is made to these maps for a further clarification of the physical and geographical features of this case. These drains are named in the findings of fact of the District Court (Record, p. 236). They are all artificially constructed drains or are artificially improved natural water courses which, prior to irrigation of Pathfinder Irrigation District lands, were dry except for flood spurts during occasional rains or melting snows. The lands which they drain all lie within the Pathfinder Irrigation District, a public corporation organized and existing under the laws of the State of Nebraska, and the waters supplying these lands are conducted to them through the Interstate Canal. These lands together with those under the Northport Canal have appropriation rights based upon the application made by the United States to the irrigation authorities of the

State of Nebraska under date of September 19, 1904. The application was made in accordance with the laws of the State of Nebraska and was authorized by Section 8 of the United States Reclamation Act (Act of June 17, 1902, 32 Statutes at Large, p. 390, Sec. 8, U. S. C. A. Title 43, Sec. 383).

5. Both the Interstate Canal with its laterals, structures, etc., and the Northport Canal with its laterals, structures, etc., were constructed upon a basis whereby the costs were ultimately to be repaid to the United States by the land owners and water users. Their water supply is in part such natural flow as is obtainable under the 1904 priority date, and in part storage water stored in the Pathfinder Reservoir and the Guernsey Reservoir in Wyoming. The Pathfinder Reservoir was constructed under a priority date in Nebraska of September 19, 1904, and in Wyoming of December 6, 1904, and the Guernsey Reservoir was constructed under a priority date granted in Wyoming as of April 20, 1923 (Record, p. 235).

6. While the Interstate Canal was constructed by the United States, and the irrigation project now known as the Pathfinder Irrigation District was initiated by the United States, it was turned over to the District in the year 1926 (Record, p. 235), and thereafter the United States retained control only of the reservoirs and of the diversion works in Wyoming (Record, pp. 235 and 236). At about the same time control of the Northport works was turned over to the Northport Irrigation District (Record, p. 236). Thus since 1926 the United States has exercised no control in Nebraska of any of the irrigation works or activities, even of the projects initiated by it.

7. In Nebraska there are appropriations from the North Platte and Platte Rivers (to which latter river the North Platte River is tributary) senior to the September 19, 1904, priority date of the Interstate Canal, Northport Canal and Pathfinder Reservoir totalling 5,453.10 second feet* which appropriations are in turn junior to the September 16, 1887, appropriation of the Tri-State or Farmers Irrigation District Canal (Record, p. 242). In the immediate vicinity of the three canals and lying between the Wyoming-Nebraska state line and Bridgeport, Nebraska, the appropriations so intervening amount to 2,100.56 second feet.

8. The Tri-State or Farmers Irrigation District Canal runs in general parallel to but nearer the river than the Interstate Canal. Its diversion point is a short distance east of the state line between Nebraska and Wyoming, and is physically situated upstream from practically all Nebraska canals diverting from the North Platte and Platte Rivers. The canal intersects all the drains in question, some of which physically spill their waters into the Tri-State or Farmers Irrigation District Canal and have no outlet to the river except as the Farmers Irrigation District may choose to spill the drainage waters, after they have mingled with the canal waters, into the river through artificially constructed spillways along the course of the canal. The drains were constructed in part through contributions made by the Farmers Irrigation District and others. On such of the

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* In this petition and brief the terms "second feet" and "acre feet" are used. The term "second feet" or "cubic feet per second" refers to rate of flow and means the number of cubic feet of water which pass a given point in one second of time. The term "acre feet" is a measure of volume, and one acre foot is the quantity of water required to cover an acre to a depth of one foot, 43,560 cubic feet. Water flowing for 24 hours at the rate of one cubic foot per second will develop 1.97 acre feet or approximately 2 acre feet.

drains as have a course past the Tri-State Canal and direct to the river, there are structures by which the drainage waters can either be diverted to the Tri-State Canal or allowed to pass down to the river. These structures are not in any respect under the control of the United States, but are solely controlled by the Farmers Irrigation District under the direction and supervision of these petitioners, the Nebraska State Irrigation Authorities (Record, pp. 236 to 237).

9. For many years the drains have been handled under the direction and authority of the Nebraska State Irrigation officers (petitioners herein) by a system of "optional diversions" or exchange of water. By this system, the drainage waters are permitted to be taken by the Farmers Irrigation District for use upon lands watered by its canal and an equivalent amount deducted from the headgate diversions of the said canal so that there is made available for appropriators down stream from the headgate of the Tri-State Canal the amount of water which is supplied to the Tri-State Canal from the drains. Thus, in effect, this amount of water is made available to the canals diverting from the river below the Tri-State headgate. These waters in turn are supplied to Nebraska appropriators in the order of their priority (Record, pp. 240 to 241).

10. The United States complains of this practice contending that since the drainage water in question comes from lands watered by the Interstate Canal it is entitled to have them carried down through the Tri-State Canal to be supplied to the Northport Irrigation District. The Nebraska State Irrigation Authorities, petitioners herein, contend that the drainage waters are public waters of the State of Nebraska under the Ne-

braska Constitution and statutes above cited, and that through the system of optional diversions above mentioned, these drainage waters are properly distributed to appropriators in the order of their priority.

11. A particular time is complained of, namely the month of May, 1936. During that time the water supply in the North Platte River was so deficient that the Northport Canal had been ordered closed to natural flow by the order of the Nebraska State Irrigation Authorities and so had a considerable number of other canals, which had priorities intervening between the Tri-State priority and the Northport priority. During that time the Nebraska State Irrigation Authorities permitted the Tri-State Canal to take such drainage waters under the optional diversion system above described. The United States complained in this suit that said waters should have been permitted to come down through the Tri-State Canal and into the Northport Canal in order to supply the lands under the Northport Canal (Record, p. 245).

12. The Nebraska system of supplying drainage water to appropriators in the order of priority as public waters of the State of Nebraska inures to the benefit of the United States in the operation of the reservoir system and to the land owners under the Interstate Canal by reason of the fact that the canals so supplied with the return flow or drainage water are all senior to the most senior priority date under which such reservoirs and Interstate Canal are supplied (September 19, 1904). The supply to those senior canals lying down stream relieves the demand of such senior canals upon the up stream water supply, and enables the United States to store and the Interstate Canal to divert waters which, under the principle of priority, would be required to be

passed down stream for the benefit of such senior canals (Record, pp. 242 to 243). In the course of the six-year period from 1931 to 1936, these benefits so taken by the United States have amounted to more than 1,300,000 acre feet (Record, p. 243). The petitioners contend that the United States by taking these benefits has recognized the right of the senior Nebraska appropriators to such drainage waters, and that the benefits so enjoyed by the United States constitute the complete right of the United States to such drainage waters.

13. In addition to the benefits so enjoyed by the United States in connection with such waters, the United States during the period complained of (May, 1936) and both before and after, has consistently and as a matter of policy diverted and used out of priority considerable quantities of water to the detriment and damage of senior Nebraska appropriators including the Farmers Irrigation District involved herein. By "out of priority" is meant the diversion or storage of water at a time when the same was needed for beneficial use by appropriators further down the river having senior priorities. The quantities so taken in the years 1931 and 1934 to 1937, inclusive, total approximately 170,000 acre feet (Record, p. 246). It is contended by petitioners that this inequitable conduct of the United States constitutes an estoppel against the United States and creates a situation wherein the United States comes into a court of equity with unclean hands and calls for the application of the principle that he who seeks equity must do equity. Upon this point, the petitioners were denied consideration by the Circuit Court of Appeals.

14. The District Court found against the United States and in favor of these petitioners (see Findings of Fact and Conclusions of Law, Record, pp. 231 to 264). An

order of dismissal was entered March 30, 1939 (Record, p. 275). On appeal to the Circuit Court of Appeals for the Eighth Circuit, the Court, upon the issues involved in this petition, reversed the District Court and remanded the cause on December 23, 1941 (Record, pp. 729 to 751, 124 Fed. [2d] 850). These petitioners filed motion for rehearing (Record, pp. 753 to 768) which was denied by the Circuit Court of Appeals on January 28, 1942 (Record, pp. 769 to 771, 124 Fed. [2d] 863).

STATEMENT OF JURISDICTION.

This court has jurisdiction in this cause on the following basis:

1. The jurisdiction of the District Court of this cause in the first instance was based upon Subdivision 1, Section 24 of the Judicial Code, U. S. C. A. Title 28, Section 41, Subdivision 1. This court has jurisdiction of this application for a writ of certiorari under the provisions of 240 (a) of the Judicial Code (U. S. C. A. title 28, Section 347, Subdivision [a]).

THE QUESTIONS PRESENTED.

The questions presented by this petition for certiorari are as follows:

1. The main question presented is whether the waters arising as seepage or return flow from lands watered from a canal originally constructed by the United States are public waters to be distributed in accordance with the laws of the state where they are located, to appropriators in order of priority, or whether they are waters privately owned by the United States in a proprietary capacity to be allotted or distributed by the United States in accordance with the orders of the Secretary of the Interior.

2. Subordinate to and a part of this question is the question of whether or not the benefits taken by the United States from the return flow or seepage waters flowing through the drains by taking waters which would be required to go down stream to supply lower senior appropriators but for the return flow supply furnished to them, exhausts the right of the United States to benefits out of the return flow, or whether in addition, the United States can take these return flow waters away from the senior appropriators.

3. In this case there is also involved the question of whether the United States, in the operation of its reclamation projects in the State of Nebraska, is subject to Nebraska laws and subject to the control of the Nebraska State Irrigation Authorities in the same manner as private irrigation projects, in view of the provisions of Section 8 of the Reclamation Act (U. S. C. A. Title 43, Section 372).

4. Another question raised is as to whether, in view of the inequitable conduct of the United States in taking water away from Nebraska appropriators out of priority, the United States equitably may assert rights in respect thereto in a court of equity in view of the equitable principles that he who seeks equity must do equity and that one who comes into a court of equity must come with clean hands.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. It is respectfully submitted that the decision of the United States Circuit Court of Appeals for the Eighth Circuit, above referred to, is contrary to the applicable laws of the State of Nebraska. The decision of ques-

tions such as those involved herein turns largely upon the state laws of the state wherein the use of the water is involved (*Snake Creek Mining and Tunnel Company* v. *Midway Irrigation Company*, 260 U. S. 596, 67 Law Ed. 423). The Nebraska Constitution and statutes require that waters be distributed in order of priority (Constitution of Nebraska, Art. 15, Secs. 5, 6 and 7; C. S. of Neb. 1929, Chapter 46, Art. 5, especially Sections 501 to 506). The decision in question permits the Northport Irrigation District, a district whose lands have appropriations junior to most of the appropriations in Nebraska, to use the waters in question in preference to Nebraska appropriators having priorities greatly senior to the priorities enjoyed by the Northport.

2. The Circuit Court of Appeals erred in following the case of *Ide* v. *The United States*, 263 U. S. 497, 68 Law Ed. 407, rather than the later case of *Ickes* v. *Fox*, supra, 300 U. S. 82, 81 Law Ed. 525. This court in the case of *Ickes* v. *Fox*, in holding that in its operations under the Reclamation Act the United States is merely a carrier of water having no right itself to make use of the same for beneficial purposes, destroyed any possible application which *Ide* v. *United States* might have to a factual situation such as exists in the instant case.

3. In Nebraska water rights, as usufructuary rights, are appurtenant to the land on which the waters are used (*Farmers Canal Company* v. *Frank*, 72 Neb. 136, 100 N. W. 286). The same rule applies with reference to water rights acquired in connection with the Reclamation Act (see Section 8, Reclamation Act, Act of June 17, 1902, Chapter 1093, 32 Stat. at Large 390, U. S. C. A. Title 43, Sec. 372; *Ickes* v. *Fox*, supra, and same case below, 85 Fed. [2nd] 294, 66 App. D. C. 128). Since

the right which was owned as an intangible usufructuary right to make use of the waters diverted through the Interstate Canal at Whalen, Wyoming, was appurtenant to the lands included in the Pathfinder Irrigation District, the exercise of that right could give no right to the United States or to the Northport Irrigation District to recapture the waters escaping from the land to which they were applied under appurtenant rights. Thus the Circuit Court of Appeals has decided this case probably in conflict with the applicable decisions of this court including *Ickes* v. *Fox*, supra.

4. This decision of the Circuit Court of Appeals for the Eighth Circuit is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Marks* v. *Hilger*, 262 Fed. 302. In the latter case it was held that the senior or prior appropriators were entitled to the seepage or return flow waters and that the junior appropriator further upstream, from whose lands the seepage came, had no right to the control of such waters after they had left his lands. The decision of the Circuit Court of Appeals in this cause is obviously in conflict with that decision since it gives the United States (assuming the United States to have the status of an appropriator) rights in such seepage waters superior to those of senior Nebraska appropriators, although the lands to which the United States proposes to furnish such waters are very substantially junior in right to the rights of such other Nebraska appropriators.

5. The questions involved in this cause include a question not heretofore decided by this court of the interpretation of the United States Reclamation Act (and, therefore, a federal question) as to the powers of the Secretary of the Interior in relation to the state

authorities of a state in which the United States Bureau of Reclamation is carrying on activities under the authority of the Secretary of the Interior. Section 8 of the Reclamation Act provides that in its operations thereunder, the Secretary of the Interior shall proceed in conformity with the laws of the state, and that no powers given shall interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation or any vested right acquired thereunder (United States Reclamation Act, Act of June 17, 1902, Chapter 1093, Sec. 8, 32 Stat. at Large 390). While there are some decisions relating to the rights of an individual in relation to the United States (*Ickes* v. *Fox*, supra; *Ide* v. *United States*, supra), it is submitted that there are no decisions of this court in causes wherein the state irirgation officers were parties, which determine the respective fields or powers of the United States in relation to such state officers. In view of the increasing importance of irrigation in western states, and in view of the possible conflicts which may exist, it is important that the meaning of Section 8 of the Reclamation Act should be decided; this can be decided best in a cause wherein both the United States and the State Irrigation Authorities are parties.

6. In refusing to consider the defense urged by these petitioners in relation to out of priority diversions, the Circuit Court of Appeals has decided a question of interstate rights in conflict with the applicable decisions of this court, particularly, the case of *Weiland* v. *Pioneer Irrigation Company*, 259 U. S. 498, 66 Law Ed. 1027. In that case this court held that as among the appropriators of water from an interstate stream where the diversion was in one state for use in another, the principles of priority of appropriation should be applied without re-

gard to state lines, and the prior appropriator was entitled to the use of the water in his order of priority even though the water was not to be used on land within the state wherein the diversion was made. In the instant case, the Circuit Court of Appeals held that the question of violation by the United States of the principle of priority of appropriation was a matter to be decided in an interstate suit now pending, and that it should take no cognizance of the issues raised by such defense. If the case of *Weiland* v. *Pioneer Irrigation Company* had been applied, the Circuit Court of Appeals would have necessarily considered the questions involved in the defense on behalf of these petitioners that the United States was estopped from obtaining relief in a court of equity by reason of its inequitable conduct in disregarding the principle of priority of appropriation.

7. The Circuit Court of Appeals erroneously assumed that the pendency of the original action in this court, *State of Nebraska* v. *State of Wyoming*, prevented the consideration by it of the matters of conflict between the United States and the State of Nebraska on division and control of water, and, thereby, said court did injustice to the State of Nebraska, its irrigators and its state water administration authorities. In the opinion in this court on Wyoming's motion to dismiss in that case (*Nebraska* v. *Wyoming*, 295 U. S. 40, decided April 1, 1935), this court held that in so far as the United States diverts water in Wyoming, its rights interstate can rise no higher than those of Wyoming, and an adjudication of Wyoming's rights will necessarily bind the Secretary of the Interior in his functions in operating United States Reclamation Projects. It is true that the United States was permitted to intervene in that cause subsequent to such decision (304 U. S. 545). However, the opinion

above referred to still stands as the opinion of this court, and thus the issues in said case are substantially different from the issues now being presented herein. The United States as plaintiff commenced this case in the District Court of the United States for the District of Nebraska in November of 1937 (Record, p. 31), and the intervention of the United States in the case of *Nebraska* v. *Wyoming* was on May 16, 1938 (304 U. S. p. 545). When the United States voluntarily undertook to submit this cause to the District Court of the United States, it is unfair and inequitable that it should be permitted to exclude from consideration issues germane and to the subject matter which might be considered as defenses merely because they are also involved in the case which was previously pending in the court, but in which the United States did not intervene until after it had commenced the case at bar.

WALTER R. JOHNSON,
Attorney General of Nebraska,

JOHN L. RIDDELL,
Assistant Attorney General of Nebraska,

PAUL F. GOOD,
Special Counsel,

Solicitors for Wardner G. Scott, State Engineer, and Head of The Department of Roads and Irrigation of the State of Nebraska; and Robert H. Willis, Chief of the Bureau of Irrigation, Water Power and Drainage, Department of Roads and Irrigation of the State of Nebraska,
Petitioners.

STATE OF NEBRASKA. }
} ss.
LANCASTER COUNTY. }

Wardner G. Scott, being first duly sworn on oath, deposes and says that he is State Engineer and Head of the Department of Roads and Irrigation of the State of Nebraska, and as such is one of the petitioners herein; that he has read the foregoing Petition for Writ of Certiorari, that he knows the contents thereof and that the statements of fact therein contained are true as he verily believes.

WARDNER G. SCOTT.

Subscribed in my presence and sworn to before me this ---------- day of April, 1942.

MAGDALENE E. GLANDT,
Notary Public.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Decision of the Circuit Court of Appeals is in Conflict With the Applicable Nebraska Law.

The applicable Nebraska constitutional and statutory provisions read as follows:

Constitution of Nebraska, Article 15, Sections 4, 5 and 6, as follows:

> "Sec. 4. WATER A PUBLIC NECESSITY. The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want. (Adopted, 1920.)
>
> "Sec. 5. USE OF WATER DEDICATED TO PEOPLE. The use of the water of every natural

stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section. (Adopted, 1920.)

"Sec. 6. RIGHT TO DIVERT UNAPPROPRIATED WATERS. The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user. (Adopted, 1920.)"

Nebraska Compiled Statutes 1929, Sections 46-502, 46-503 and 46-504 as follows:

"46-502. WATER, DEDICATED TO PUBLIC USE. The water of every natural stream not heretofore appropriated within the State of Nebraska is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as herein provided.

"46-503. SAME, APPROPRIATORS FIRST IN RIGHT. As between appropriators, the one first in time is first in right.

"46-504. SAME, APPROPRIATION, PRIORITY. The right to divert unappropriated waters of every natural stream for beneficial use shall never be

> denied. Priority of appropriation shall give the better right as between those using the water for the same purposes, but when the waters of any natural stream are not sufficient for the use of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes."

It is the contention of the petitioners that, under these provisions of the Nebraska statutes and constitution, the water in question, namely, the waters flowing in the drains, must be distributed to appropriators in Nebraska in their order of priority. In effect, the decision of the Circuit Court of Appeals takes these waters away from the senior Nebraska appropriators who are in need of the waters and gives them to the lands under the Northport Irrigation District, who are junior appropriators.

While the Nebraska Supreme Court has never interpreted these statutory and constitutional provisions in their relation to return flow waters, we believe that such waters are clearly within the purview of these provisions, and that the decision of the Circuit Court of Appeals does violence to Nebraska law.

It is, of course, elementary that an appropriator of water has only a usufructuary right and that he acquires no ownership in the corpus of the water itself. His right is intangible to apply the water to beneficial use, but his right is based upon the uses which he makes of the water and never constitutes ownership of the water itself (See 30 American Jurisprudence, page 616; *Atchison* v. *Peterson*, 87 U. S. 507, 22 Law Ed. 414). The same principle underlies rights acquired under the

United States Reclamation Act, wherein it is stated "beneficial use shall be the basis, measure and limit of the right" (Act of June 17, 1902, Chapter 1093, Sec. 8, 32 Statutes 390, 43 U. S. C. A. Sec. 372).

Moreover this provision of the Reclamation Act is also coupled in the same section with the provision that water rights under that act shall be appurtenant to land.

The Nebraska law is likewise to the same effect (*Farmers Canal Company* v. *Frank*, 72 Neb. 136, 100 N. W. 286).

It seems clear that the right of the landowner under the Pathfinder Irrigation District, for whom the water was diverted, must have ceased when he has made use of it on his land. Before the water ever could be in the drain (the condition which gives rise to the dispute), the beneficial use made by that landowner must have ceased, and his right must, therefore, be considered to have been extinguished.

This court has recently held that the United States is not the owner of the water rights under the Reclamation Act, and is merely a carrier of water with no right to make any beneficial use thereof (*Ickes* v. *Fox*, 300 U. S. 82, at pages 94 to 96, 81 Law Ed. 525, at pages 530 to 531).

The general rule in irrigation states is that drainage waters, including return flow waters, belong to the stream from which they were taken for distribution among appropriators in the order of their priority, and are not the property of the landowner for whose land they were first diverted.

Comstock v. *Ramsey*, 55 Colo. 244, 133 Pac. 1107.

Durkee Ditch Company v. *Means*, 63 Colo. 6, 164 Pac. 503.

Trowell Land & Irr. Dist. Co. v. *Bijou Irr. Dist.*, 65 Colo. 203, 176 Pac. 292.

Rio Grande Reservoir and Ditch Co. v. *Wagon Wheel Gap Improvement Co.*, 68 Colo. 437, 191 Pac. 129.

Ft. Morgan Reservoir & Irr. Co. v. *McCune*, 71 Colo. 256, 206 Pac. 393.

Rock Creek Ditch & Flume Co. v. *Miller*, 93 Mont. 248, 17 Pac. (2d) 1074, 89 A. L. R. 200.

Rasmussen v. *Moroni Irr. Co.*, 56 Utah 140, 189 Pac. 572.

Schulz v. *Sweeney*, 19 Nev. 359, 11 Pac. 253.

Irrigation Co. v. *Campbell*, 2 Idaho 411, 18 Pac. 52.

Josslyn v. *Daly*, 15 Idaho 137, 96 Pac. 578.

McClintock v. *Hudson*, 141 Cal. 275, 74 Pac. 850.

Los Angeles v. *Hunter*, 156 Cal. 603, 105 Pac. 753.

Irrigation Co. v. *Irrigation Co.*, 31 Colo. 62, 72 Pac. 49.

Eddy v. *Simpson*, 3 Cal. 249, 58 Am. Dec. 408.

Marks v. *Hilger*, (C. C. A. 9) 262 Fed. 302.

Wills v. *Morris*, 100 Mont. 514, 50 Pac. (2d) 862.

II.

The Decision of the Circuit Court of Appeals in This Case is in Conflict With the Previous Decision of This Court in Ickes v. Fox, 300 U. S. 82, 81 L. Ed. 525.

The claims of the United States in this cause are all based upon the United States Reclamation Act cited supra. The original application made to the Nebraska State Department of Irrigation was made by the United

States in the year 1904 for the purpose of irrigating and reclaiming lands in Wyoming and Nebraska, including the lands now embraced within the Pathfinder Irrigation District, and from which the drains in question carry off the unused seepage and return flow. The United States has by contract turned over the canal through which water is carried to the Pathfinder Irrigation District lands to said district for operation, reserving control only of the channel reservoirs, power plants and diversion works on the river (Record, pp. 235 to 236). The contract under which this was done is set out fully in Exhibit G, attached to the plaintiff's bill of particulars (Record, pp. 69 to 104).

Moreover, entire control of the drains, in so far as they deliver water into the Tri-State Canal, rests with the officers of the Farmers Irrigation District, subject to the control and authority of these petitioners, the Nebraska State Irrigation Authorities (Record, pp. 236 to 237).

The decision of the Circuit Court of Appeals seems to be based upon *Ide* v. *the United States* (263 U. S. 497, 66 L. Ed. 407) rather than the later case of *Ickes* v. *Fox*. In the Ide case the controversy seemed rather to be as between the reclamation project and a *subsequent* appropriator who made a filing in which he attempted to appropriate the water after drainage from the reclamation project had transformed a dry-wash into a living stream. There is thus clearly a greatly different factual situation in the Ide case from that which exists in the instant case. In the instant case, these petitioners are attempting to distribute the unused drainage waters which come from a diversion of North Platte River waters, among appropriators from the North Platte River in the order of their priority and in conformity with the laws of the State of Nebraska and the laws of the

United States. With this method of distribution, the decision of the Circuit Court of Appeals interferes in that it requires that such waters should be supplied to junior appropriators within the Northport Irrigation District rather than to those water users having senior appropriations from the same source.

In applying the Ide case the court below apparently adopted the theory that the rights of the United States were essentially those of an appropriator from the stream who had the right to reuse the water. The discussion of this point is found on page 861 of 124 Fed. (2d) (Record, p. 746). The court's discussion of the rights of the owner of the irrigation canal is in part erroneous and in part not applicable to such a situation as that disclosed in the instant case.

The court says, "The owner of the irrigation project or canal also has an interest in such appropriative rights, by virtue of the fact that the statute permits him to make the appropriation and diversion, that the maintenance of such appropriative rights is necessary in accomplishing the purpose of the project or canal, and that the law imposes certain duties and obligations upon him in the carriage, distribution and conservation of the diverted waters."

In the first place the appropriation is not made by the United States. An appropriation includes more than filing an application for a permit and constructing the canal. An appropriation is not perfected or completed until the water is put to beneficial use. This is the effect of the opinion of Mr. Justice Brandeis in *Arizona* v. *California*, 283 U. S. 423 at page 459, 75 L. Ed. 1154 at 1168. The court there stated:

> "To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the state where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations."

The same rule is apparent from *Ickes* v. *Fox,* 300 U. S, 82, 81 L. Ed. 525, but it is perhaps more clearly stated in the opinion in that case in the court below, 85 Fed. (2d) 294 at page 298, in the following language:

> "It is settled irrigation law that mere diversion and storage of water does not constitute an appropriation. Before there can be an appropriation the water must be applied to a beneficial use. Highland Ditch Company v. Union Reservoir Company, 53 Colo. 483, 127 Pac. 1025. In Pioneer Irrigation D. Co. v. Board of Commissioners, (D. C.) 236 F. 790, the court, considering constitutional and statutory provisions similar to those of the state of Washington, held that under the Constitution and statute relating to water rights, as construed by the Supreme Court of the State, no property right can be acquired in the use of water until it is applied to a beneficial use. The owner of the carrying ditch gets no title or right to the use of the water and has no property in it subject to disposal, but such property right of disposal is in him who applies the water to beneficial use."

Nebraska law is to the same effect (*Commonwealth Power Company* v. *State Board of Irrigation,* 94 Neb. 613 at 616, 143 N. W. 937 at 938; *Kersenbrock* v. *Boyes,* 95 Neb. 407, 145 N. W. 837.

The Reclamation Act does not authorize the Secretary of the Interior or any other federal officer or agent to put water to beneficial use under an irrigation project. That is for the homesteader or landowner. Thus the Circuit Court of Appeals is in error in stating that the statute permits the United States, as owner of the irrigation canal, to make the appropriation. The actual situation is that the United States applies for the permit; the permit is issued to the United States; the United States then constructs the diversion works and canal and other necessary physical structures; the United States diverts the water. All these steps are necessary but not sufficient for a completed appropriation. That comes about only when the landowner has actually received the water and applied it to beneficial use. The canal owner is only a carrier of water having no beneficial interest in either the water or the water rights (*Ickes* v. *Fox*, 300 U. S. 82 at 95 to 96, 81 Law Ed. 525 at pages 530 to 531).

The court below further states that the interest of the United States comes about in part because the maintenance of the appropriative rights is necessary in accomplishing the purpose of the project or canal. This is obviously fallacious since the maintenance of the appropriative rights depends primarily upon the beneficial use made of the water. When the beneficial use ceases, the right ceases. This is elementary under irrigation law (Sec. 8 of the United States Reclamation Act, U. S. C. A., Title 43, Sec. 372).

67 C. J. 1022 (Waters, Sec. 450).
Dern v. *Tanner*, 60 Fed. (2d) 626.

The court below further states that the law imposes certain duties and obligations on the United States in

the carriage, distribution and conservation of the diverted waters. These duties are not defined, nor is the law cited as to where it is announced that such duties and obligations exist. However, even though that may be the case in some instances, in this situation those duties devolve upon the Pathfinder Irrigation District rather than on the United States. The trial court found upon uncontroverted evidence, that after the contract of 1926, "control of all of said Interstate Canal, including all structures, distribution system, etc., passed to said Pathfinder Irrigation District. That said irrigation district consists substantially of the lands in Nebraska irrigated and watered by said Interstate Canal, and its control, in accordance with the laws of the State of Nebraska, is in the hands of the landowners and water users" (Record, pp. 235 to 236).

Thus, the duties and obligations relating to the carriage, distribution and conservation of the diverted waters are entirely in the hands of the Pathfinder Irrigation District, a Nebraska corporation, controlled by the landowners and water users.

This condition even more clearly prevails in relation to the lands of the Northport Irrigation District, which carries and distributes the waters for the Northport lands for which the United States wishes to make these waters available (Record, p. 236). In the case of the Northport Irrigation District, even the diversion works are not in the control of the United States. The waters diverted from the river for the benefit of the Northport are diverted by the Farmers Irrigation District at the head of the Tri-State Canal (Record, p. 238). The drainage waters that might physically be made available for the Northport lands are likewise entirely under the control of

the Farmers Irrigation District (so far as concerns their diversion) (Record, pp. 236 to 237).

Thus, it becomes clear that the court below is wrong in holding, as it does on page 861 of 124 Fed. (2d) (Record, p. 746), that the United States has a proprietary interest in either the appropriation for Pathfinder Irrigation District lands or in the appropriation for Northport Irrigation District lands.

III.

The Decision is in Conflict With an Earlier Decision of the Circuit Court of Appeals for the Ninth Circuit in Marks v. Hilger, 262 Fed. 302.

It is to be noted from the opinion of the Circuit Court of Appeals that the two cases on which the decision is based, namely, *Ide* v. *United States,* 263 U. S. 497, and *United States* v. *Ramshorn Irrigation District,* 269 Fed. 81, relate to conflicts between the reclamation project and *subsequent* appropriators. The instant case deals with the question as to whether the seepage waters, after they have left the lands for which they were appropriated and diverted, will be supplied to the senior appropriators in Nebraska or a junior reclamation project which is, likewise, in Nebraska. The analogy, therefore, is not with the Ide case or the Ramshorn case, but rather with the case of *Marks* v. *Hilger.* In that case the controversy was between an upper junior appropriator (Mr. Marks) and the lower senior appropriator (Mr. Hilger). Marks contended that he should receive the benefits of the return flow created by his large diversions in time of abundance, by being permitted to take an increased amount of water later in the season when the seepage from his lands enlarged the flow of the stream beyond its natural condition. The court said:

"It is established in Montana that the prior appropriator of water is entitled to the use of all the water in the stream to satisfy his appropriation, whether such water come from seepage or from the water naturally flowing the stream. In Beaverhead Canal Co. v. Dillon Electric Co., 34 Mont. 141, 85 Pac. 882, the court said:

> " 'The prior appropriator of a particular quantity of water from a stream is entitled to the use of that water, or so much thereof as naturally flows in the stream, unimpaired and unaffected by any subsequent changes which, in the course of nature, may have been wrought. To the extent of his appropriation his supply will be measured by the waters naturally flowing in the stream and its tributaries above the head of his ditch, whether those waters be furnished by the usual rains or snows, by extraordinary rain or snowfall, or by springs or seepage which directly contribute.'

"Again, under the doctrine that the prior appropriator is entitled to the quantity of water appropriated from the stream, the prior appropriator is entitled to satisfy that right, and it is immaterial whether such satisfaction is to be had out of the waters that naturally flow in the stream and its tributaries above the head of its ditch, or come from waters which run into the stream by rains, snows, springs or seepage."

It is the contention of petitioners that the Marks case definitely establishes the principle in the Ninth Circuit that return flow waters belong to the stream; are public waters; and that they must be distributed to the senior appropriators in accordance with the laws of the state where they become available. The decision of the Circuit Court of Appeals in this cause is directly contrary and, in effect, awards these return flow or seepage waters to

the junior at the expense of the senior, solely upon the theory that they are not available to the public for distribution to appropriators in the order of their priority.

IV.

The Interpretation of the Reclamation Act and the Authority of State Officials Over Waters Appropriated Pursuant to the Reclamation Act Has Not Been But Should Be Decided By This Court.

It is apparent from the record in this cause that the contention is being made upon behalf of the United States that the officials of the United States are authorized to proceed independently of the authority of the State Irrigation Officials of the State of Nebraska, notwithstanding the provisions of Section 8 of the Reclamation Act above stated. It will be recalled that the terms of Section 8 (in so far as applicable to this point) provide as follows:

> "Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. (June 17, 1902, c. 1093, Sec. 8, 32 Stat. 390.)" (U. S. C. A. Title 43, Sec. 383.)

It is true that in the case of *Nebraska* v. *Wyoming*, 295 U. S. 40, this court held that this provision of the

act of congress made the Secretary of the Interior subordinate to the state authorities in connection with the operation of the reclamation project. It is likewise true that in the case of *California-Oregon Power Company* v. *Beaver Portland Cement Company*, 295 U. S. 142, this court likewise recognized the authority of state laws and state administrative authorities over the waters of the state even in the western states which were carved out of the public domain.

In neither of these cases, however, was the United States or any officer of the United States a party at the time of the decision, nor does it appear from the published reports that the United States Department of Justice participated in briefs or arguments either as friend of the court or otherwise.

The action of the United States Bureau of Reclamation in connection with this cause and the contentions made by the United States, together with the decision by the Circuit Court of Appeals, would seem to indicate a theory that the United States is seeking to control the waters independent of the administrative authority of the Nebraska State Irrigation Authorities. These authorities, as petitioners herein, respectfully submit that such an interpretation is contrary to the specific language and the specific direction of the Reclamation Act as above quoted, and is contrary to the previous opinions of this court.

Clearly the question of the relative positions of the State Irrigation Authorities and of the Department of the Interior and Bureau of Reclamation is an important issue in this case, and can properly be decided herein, since the parties are before this court. It is obvious that the public interest requires the authoritative decision by this court of so important a matter as between state and federal authorities.

V.

The Denial of Rights To the State of Nebraska in Relation To Water Rights on an Interstate Stream.

One of the defenses urged by these petitioners in the United States District Court was that the United States was guilty of inequitable conduct in relation to the subject matter of the litigation; that it sought equity without doing equity; and that it did not come into the court with clean hands. The inequitable conduct urged was that the United States had violated the principles of priority of appropriation by diverting and storing in Wyoming waters of the North Platte River under its junior priority of September, 1904, at times when those waters were needed by senior appropriators in Nebraska. This contention was sustained by the United States District Court, and a specific finding of fact was made in relation thereto (Record, p. 246).

The Circuit Court of Appeals held in relation thereto that the pendency of the Nebraska-Wyoming suit made it impossible for it to consider such equitable defense (Record, pp. 749 to 750, 769 to 770; 124 Fed. [2d], pp. 862 to 864).

Incidentally, in connection with this issue, the Circuit Court of Appeals states in its opinion on the petition for rehearing (Record, pp. 769 to 770; 124 Fed. [2d], pp. 863 to 864), that the trial court limited the questions to be considered so as to exclude all matters which were at issue in the case of *Nebraska* v. *Wyoming*, and that counsel acquiesced therein. We most respectfully submit that the record does not bear out this interpretation made by the Circuit Court of Appeals; in fact, quite the contrary is true as is demonstrated by the finding of fact

above mentioned. This issue, at least, was not eliminated by the trial court, either with or without acquiescence of counsel. On the contrary, the issue of the out-of-priority diversions was clearly considered by the trial court to be an important issue in the case.

We believe that the Circuit Court of Appeals did not sufficiently apprehend the nature of the issues involved in the case of *Nebraska* v. *Wyoming* nor its present status. The case of *Nebraska* v. *Wyoming* was filed as an original action in this court complaining of the actions of Wyoming in relation to the water of this interstate stream, and asking that Wyoming be required to let Nebraska have its proper share of such waters. The relief of individual appropriators is at issue in that case in so far as the actions of Wyoming appropriators, authorized and sanctioned by the Wyoming Irrigation Authorities, brings about the encroachment on Nebraska's share of the water, and so far as concerns Nebraska appropriators, their rights are important as being at least partially the measure of the rights of Nebraska.

In this case, however, the rights of the appropriators are directly involved, and their claims to the water are the precise subject of the adjudication sought.

We believe that the record shows that the United States has deliberately and consistently taken away from Nebraska senior appropriators large volumes of water out of priority. In fact this was going on in May of 1936 at the time when the plaintiff complains of the failure of Nebraska Irrigation Authorities to give to them the return flow waters (Record, p. 246). It was held by this court in *Weiland* v. *Pioneer Irrigation Company*, 259 U. S. 498, that where the respective states both recognize the principle of priority of appropriation rights,

then the rights as between appropriators from the same interstate stream but in different states, are to be determined upon the same principle of priority of appropriation.

It is well settled that where the United States comes into a court of equity as plaintiff, it is bound by the same principles of equity as if it were a private litigant.

Brent v. *The Bank of Washington*, 10 Peters 35 U. S. 596 at p. 615, 9 L. Ed. 547 at 555.

Luckenbach Steamship Co. v. *Norwegian Barque Thekla*, 266 U. S. 328 at 339, 69 L. Ed. 313 at 315 (Opinion by Mr. Justice Holmes).

Hemmer v. *United States*, (C. C. A. 8 Circ.) 204 Fed. 898 at 901.

Folk v. *United States*, (C. C. A. 8 Circ.) 233 Fed. 177 at 191.

Ladd and Tilton Bank v. *U. S.*, (C. C. A. 9 Circ.) 30 Fed. (2d) 334.

Shooters Island Shipyard Co. v. *Standard Ship Building Corporation*, (C. C. A. 3 Circ.) 293 Fed. 706.

Kandle v. *U. S.*, (C. C. A. 3 Circ.) 4 Fed. (2d) 183.

U. S. v. *Shelby Iron Company*, (C. C. A. 5 Circ.) 4 Fed. (2d) 829.

U. S. v. *Stinson*, (C. C. A. 7 Circ.) 125 Fed. 907 at 910.

U. S. v. *Chandler-Dunbar Water Power Company*, (C. C. A. 6 Circ.) 152 Fed. 25 at 40-41. 65 C. J. 1403.

Walker v. *United States*, 139 Fed. 409.

United States v. *Debel*, (C. C. A. 8 Circ.) 227 Fed. 775.

United States v. *Denver and Rio Grande Western Railroad Company*, (C. C. A. 8 Circ.) 16 Fed. (2d) 376.

Dayton Airplane Co. v. *United States*, (C. C. A. 6 Circ.) 21 Fed. (2d) 673.

Moreover, this court in *Nebraska* v. *Wyoming*, 295 U. S. 40, cited above, clearly recognizes the position of the United States in relation to a reclamation appropriation to be no better than that of the appropriators discussed in *Weiland* v. *Pioneer Irrigation Company*, supra.

The remedy suggested by the Circuit Court of Appeals was that the District Court might adjust the rights by making relief to the United States conditional upon its observance of priorities if this court should have decided that such observance should be had. This court will, of course, take judicial notice of its own records to the extent, at least, of examining the present status of the case of *Nebraska* v. *Wyoming*. The records of this court will disclose that the case of *Nebraska* v. *Wyoming* is now before the Special Master appointed by this court, and that no report has been made. As a matter of fact, it is not expected that his report can be ready before January, 1943, and, of course, following that it will be necessary for parties who feel themselves aggrieved to file exceptions with this court and brief them so that said case cannot probably be submitted to this court until the October term, 1943, at the earliest. Thus the remedy suggested by the Circuit Court of Appeals must be illusory.

It is thus respectfully submitted that the refusal by the Circuit Court of Appeals to consider the inequitable conduct of the United States as found by the District Court results in a substantial denial of justice to these petitioners.

VI.

The Circuit Court of Appeals Failed To Take Into Account the Benefits Already Received By the United States From the Return Flow or Seepage Waters.

It is the contention of these petitioners that the opinion and order of the Circuit Court of Appeals gives the United States double benefits at the expense of Nebraska appropriators. The record is clear that, due to the relation of priorities and the physical situation on the river, the operation of the return flow by furnishing it to senior Nebraska appropriators gives to the United States an equivalent benefit in that it is enabled to store water in the reservoirs and to divert waters at Whalen at times when the seniors are supplied from the return flow and at times when priority administration would otherwise require that the United States should be prevented from taking the water if the seniors did not get the return flow supply. This is the finding of the court below (Record, pp. 242 to 244). This is based upon uncontradicted testimony of the witness for the United States, Mr. Raymond F. Walter, the chief engineer for the Bureau of Reclamation (Record, pp. 383 to 384).

It is to be noted that in none of the cases involving matters of return flow has there been a similar situation unless, possibly, in the case of *Marks* v. *Hilger*, (C. C. A. 9) 262 Fed. 302. In that case, the physical situation is not as clearly stated as one could wish from this point of view.

We wish most respectfully to urge on behalf of the State Irrigation Authorities of Nebraska that equitable considerations make it unfair and unjust that the junior

appropriator should deprive the senior appropriator of these waters when they have already taken the benefit of them through the upstream uses.

CONCLUSION.

It is respectfully submitted that this is a cause of which this court should take jurisdiction. The Circuit Court of Appeals has failed to follow the applicable Nebraska law as well as the previous decisions of this court, and has brought about a conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit.

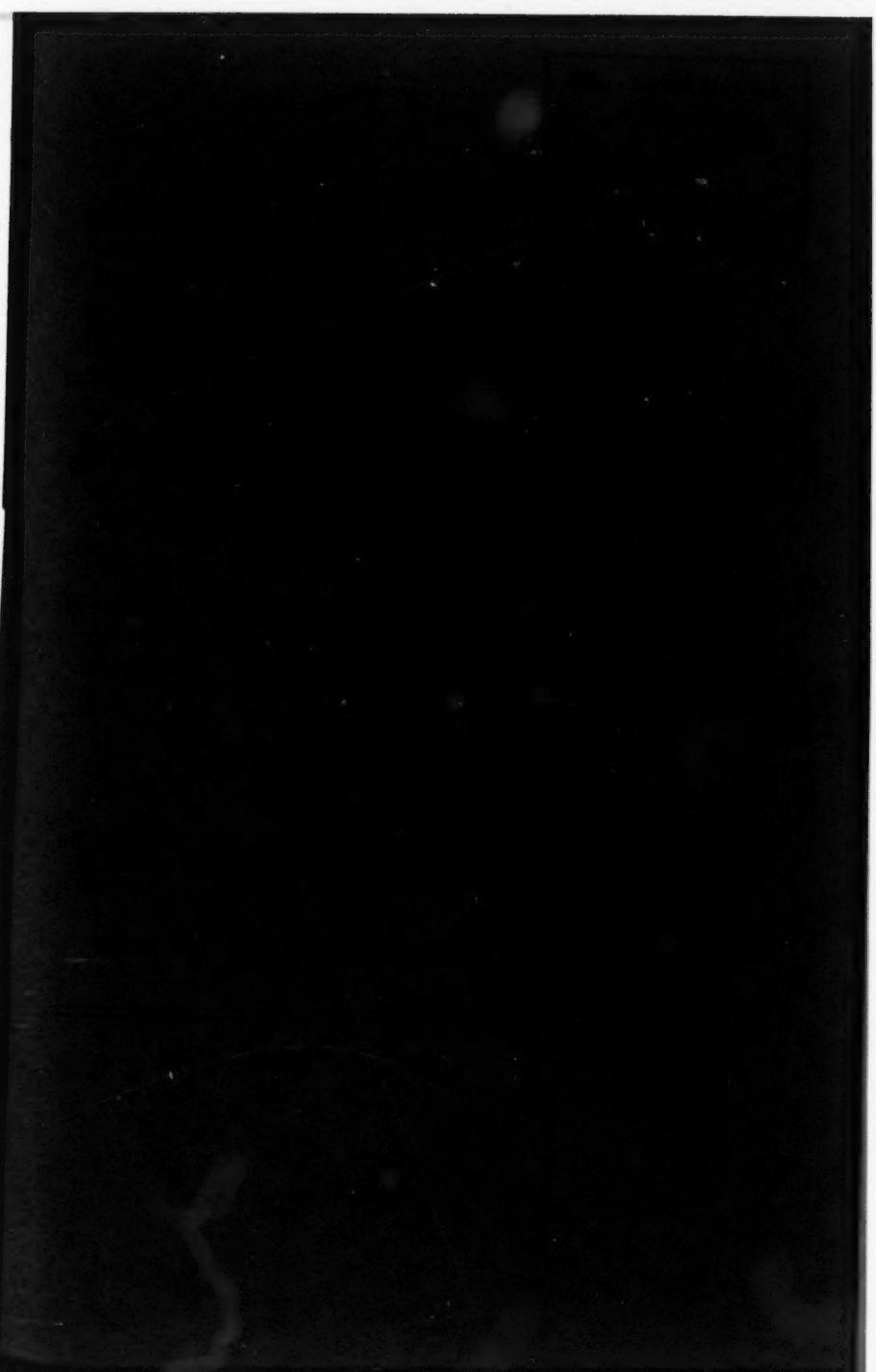
The result of the decision is to deprive senior Nebraska appropriators of waters to which they are entitled under Nebraska law, and we believe that upon the merits, if and when this court should grant certiorari, this court would conclude that the District Court was right and that its decree should be reinstated.

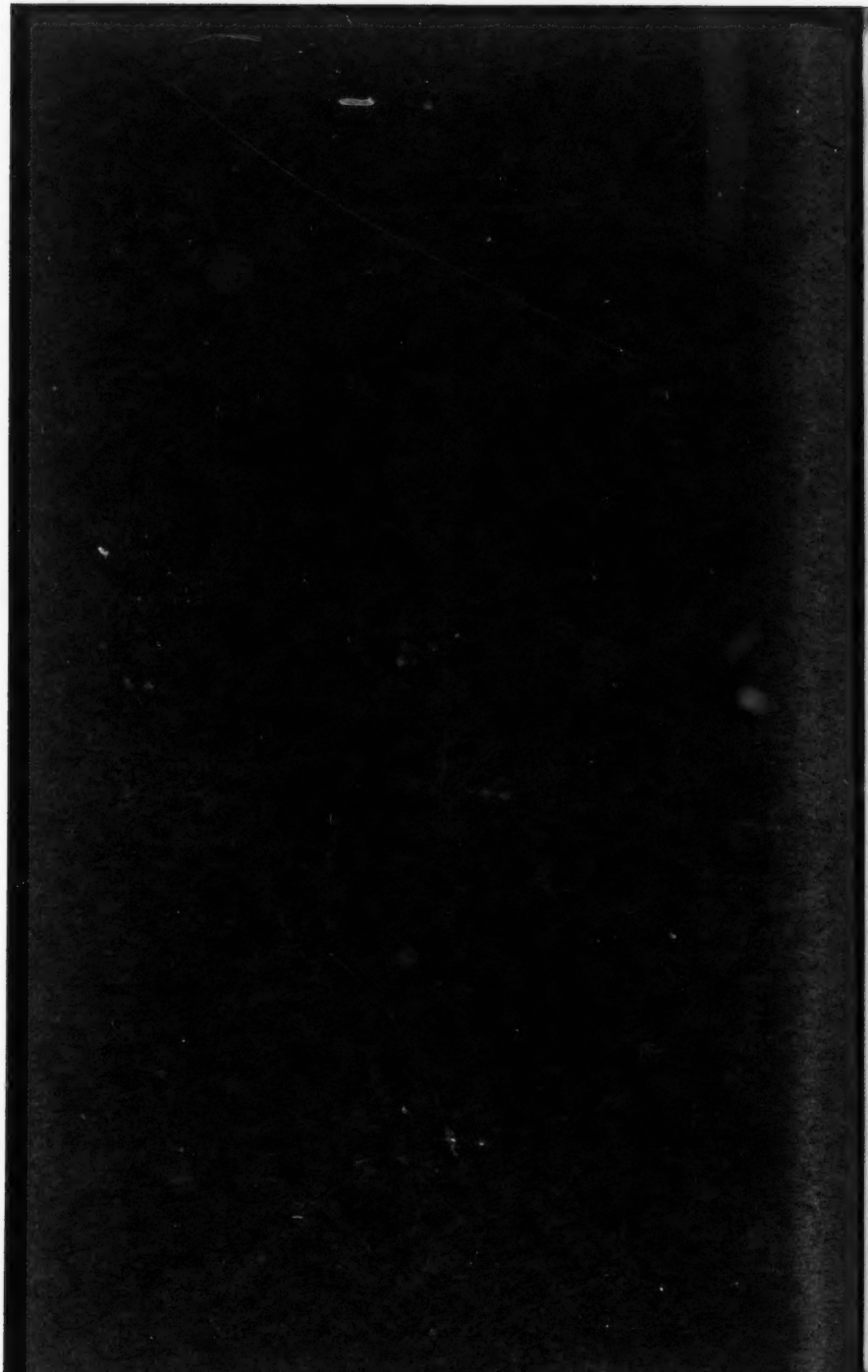
Respectfully submitted,

WALTER R. JOHNSON,
Attorney General of Nebraska,

JOHN L. RIDDELL,
Assistant Attorney General of Nebraska,

PAUL F. GOOD,
Special Counsel,
Solicitors for the Petitioners.





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Reclamation Act of June 17, 1902, c. 1093, sec. 8, 32 Stat. 388 (43 U. S. C. sec. 383)	2

Miscellaneous:

1 Pomeroy, *Equity Jurisprudence* (4th ed., 1918), sec. 398, p. 729	9

460254—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1174

WARDNER G. SCOTT, STATE ENGINEER AND HEAD OF THE DEPARTMENT OF ROADS AND IRRIGATION OF THE STATE OF NEBRASKA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court delivered no opinion. The opinions of the Circuit Court of Appeals (R. 729–751, 769–770) are reported in 124 F. (2d) 850 *sub nom. United States* v. *Tilley.*

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on December 23, 1941 (R. 751–752). A petition for rehearing

filed by petitioner was denied on January 28, 1942 (R. 771). The petition for writ of certiorari was filed April 24, 1942. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the return flow of appropriated waters from lands within a government irrigation project may be collected by the United States as appropriator and applied to further beneficial use upon other lands within the same project.

STATEMENT

In 1904, pursuant to the Reclamation Act of June 17, 1902, c. 1093, 32 Stat. 388, the United States initiated the North Platte Irrigation Project to irrigate lands in Wyoming and Nebraska with water from the North Platte River (R. 233). In operating its plan, the Government diverts water from the river into the canal of the Interstate Division of the project (R. 234).[1] The Interstate lands are traversed by several drains which carry off the return flow of drainage and seepage waters. These drains cross the canal of the Farmers' Irrigation District (hereinafter referred to as the district), which is not a part of

[1] The Nebraska lands of the Interstate Division have been incorporated into the Pathfinder Irrigation District, a Nebraska corporation (R. 235–236).

the North Platte Project (R. 236–237). The canal of the Northport Division of the project has its headgate on the district's canal (R. 234–235) and, by contract of August 10, 1915, the district agreed to carry to the Northport headgate waters owned by the United States (R. 238, 720).

The district has a Nebraska appropriation with a priority date of September 16, 1887 (R. 237). The United States has a Nebraska appropriation with a priority date of September 19, 1904 (R. 235). This appropriation covers the lands of the Interstate and Northport divisions (R. 463–464).

Several years before institution of the present suit, the Nebraska Department of Roads and Irrigation, of which petitioner Scott is now head, initiated the practice of permitting "optional diversion" by appropriators of water. Under this practice, an appropriator may take drainage and seepage waters in lieu of natural flow and *pro tanto* satisfy his appropriative rights. (R. 240.) In the spring of 1936, the district insisted on taking water from the Interstate drains in satisfaction of its 1887 appropriation and refused to honor the demand of government officers that under the contract with the United States the district should carry this water to the headgate of the Northport canal. Petitioners sustained the district's claim on the ground that the rule of optional diversion was applicable. (R. 502–503, 508, 540, 555.)

In November 1937, the United States brought this action to enjoin petitioners from permitting the district to take the return-flow waters (R. 1–31).[2] The District Court of the United States for the District of Nebraska dismissed the complaint (R. 275) on the ground that these drainage and seepage waters were public waters of Nebraska and hence appropriable by the district (R. 257–258). The Circuit Court of Appeals reversed (R. 751–752).

ARGUMENT

1. The waters in controversy are derived from water diverted to the lands of the Interstate Division by the United States. These diversions are made pursuant to a Nebraska appropriation which covers not only the Interstate Division but also the Northport Division. Petitioners maintain that drainage and seepage waters, in return flow, belong to the stream from which they were taken and are not at the disposal of the appropriator for whose lands they were first diverted (Pet. 20). The Circuit Court of Appeals, however, held that under Nebraska law an appropriator of waters is entitled—after applying them

[2] The complaint also asked other relief, against the district, upon the basis of a contract entered into August 20, 1912, between the Government and the district's predecessor. Upon this issue the court below held against the Government (see R. 730–740). As the opinion states (R. 730), the Government's case against the district was distinct from its complaint against the state officers.

to land—to collect the drainage and seepage for further use upon other land covered by the appropriation (R. 741). In so holding, the court adhered to the view of Nebraska law enunciated by it in *Ramshorn Ditch Co.* v. *United States,* 269 Fed. 80, 83. It pointed out that the *Ramshorn* decision had not been questioned by the courts or legislature of Nebraska and that a decision and statute in that state confirmed the view that an appropriator is granted the fullest possible beneficial use of the waters of his appropriation (R. 742, 744).[3]

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[3] Petitioners mistakenly assert (Pet. 20–21) that the rule for which they contend prevails in the majority of irrigation states. On the contrary, as the Circuit Court of Appeals pointed out (R. 741), the rule of the *Ramshorn* case is generally applied. See, *e. g., Ide* v. *United States*, 263 U. S. 497, 505; *United States* v. *Haga*, 276 Fed. 41, 43 (D. Idaho); *Griffiths* v. *Cole*, 264 Fed. 369, 373–374 (D. Idaho); *McKelvey* v. *North Sterling District*, 66 Colo. 11, 14–15; *Lambeye* v. *Garcia*, 18 Ariz. 178, 183; *Brewster* v. *Salt River Etc. Assn.*, 27 Ariz. 23, 38–39; *Burkart* v. *Meiberg*, 37 Colo. 187, 189; *Garns* v. *Rollins*, 41 Utah 260, 266–271; *Hagerman Irr. Co.* v. *E. Grand Plains D. D.*, 25 N. M. 649, 656–657.

Petitioners assert a conflict between the decision below and a decision of the Circuit Court of Appeals for the Ninth Circuit (Pet. 13, 21, 27–29); they rely on *Marks* v. *Hilger*, 262 Fed. 302 (C. C. A. 9). That case, however, merely held that a junior appropriator could not justify a diversion *in excess of his appropriation* on the ground that a senior appropriator could receive enough water by taking the drainage waters therefrom, *i. e.*, that one having the right to appropriate natural flow could not be compelled to take instead drainage waters.

Abandoning their efforts to distinguish the *Ramshorn* case (cf. argument below, R. 743–747; petition for rehearing, R. 762–763), petitioners do not mention it in their petition for certiorari. They concede (Pet. 19) that there is no Nebraska decision on the question. It is obvious, therefore, that there is no merit in petitioners' contentions that the decision is in conflict with Nebraska law (Pet. 11–12, 17–21) and that it fails to give effect to the direction of section 8 of the Reclamation Act, c. 1093, 32 Stat. 390 (43 U. S. C. sec. 383), that the Secretary of the Interior in carrying out the provisions of the statute shall proceed in conformity with local irrigation laws (Pet. 11, 13–14, 29–30).

2. Petitioners also assert (Pet. 12–13, 23, 25–26) that the United States does not *own* the waters or the rights in the waters which are diverted from the river for the North Platte project, and that therefore the Government is not entitled to dispose of the return flow. They urge that the decision of the Circuit Court of Appeals, holding that the United States may dispose of the drainage and seepage waters, conflicts with *Ickes* v. *Fox,* 300 U. S. 82. The Court there held that in suits to enjoin the Secretary of the Interior from depriving landowners in an irrigation project of water rights, obtained by contract from the Government, the United States was not an indispensable party because the suits had been brought on the theory that the Secretary had acted beyond

the scope of his authority. While the opinion states that the landowners rather than the Government owned the water rights in question (300 U. S. 94–96), the case was not concerned with the Government's interest in appropriated waters beyond the existence of the vested right of the landowners as against the United States in those waters.

An earlier decision, *Ide* v. *United States,* 263 U. S. 497, established specifically that the Government retains the right to collect drainage and seepage for use again after waters appropriated by the Government for an irrigation project have once been used by landowners. There the Court said:

> A further contention is that the plaintiff [the United States] sells the water before it is used, and therefore has no right in the seepage. But the water is not sold. In disposing of the lands in small parcels, the plaintiff invests each purchaser with a right to have enough water supplied from the project canals to irrigate his land, but it does not give up all control over the water or do more than pass to the purchaser a right to use the water so far as may be necessary in properly cultivating his land. *Beyond this all rights incident to the appropriation are retained by the* plaintiff. * * * [263 U. S. at 505–506.] [Italics supplied]

So here, the United States, while investing purchasers of water on the lands of the Interstate

Division with rights to use the water in cultivation of the lands, retains the right to dispose of the drainage and seepage for the benefit of the Northport Division.

3. Petitioners make the further contention (Pet. 9, 11, 15–16, 31–34) that the court below erroneously refused to consider their defense that the Government had come into court with unclean hands. However, petitioners did not make out the defense. They merely offered in evidence an exhibit prepared by a witness for the State of Nebraska in *Nebraska* v. *Wyoming,* No. 7 Original, this Term, which was designed to show the quantities of water taken from the North Platte River in Wyoming by the United States during periods when there were unsatisfied demands of Nebraska appropriators claiming an earlier priority date in Nebraska than that of the Government's Wyoming appropriation (R. 594–596).[4] Whether these takings were illegal depends upon whether Wyoming appropriations are subordinate to Nebraska appropriations of an earlier date, and that question is an issue in the original suit in this Court. The questions in issue there were eliminated from the present case by the District Court (R. 294–

[4] The United States also has a Wyoming appropriation with a priority date of December 6, 1904 (R. 235). However, the present suit was presented to the District Court on the theory that the Government's right to the drainage and seepage waters rested on the Nebraska appropriation (R. 292).

295; see R. 770). Consequently, despite petitioners' implication to the contrary (Pet. 31, 32), the District Court did not decide this question in their favor. It merely found that the Government's diversions were "out of priority" (R. 246), and left undecided whether they were inequitable or even illegal. Obviously the finding fell far short of a holding that the United States came into court with unclean hands, *i. e.,* that its conduct was "unconscientious or unjust, or marked by a want of good faith or * * * [in violation of] any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain." See 1 Pomeroy, *Equity Jurisprudence* (4th ed., 1918), sec. 398, p. 739. Accordingly, the Circuit Court of Appeals rightly held (R. 769–770) that there was no basis for the view that the United States by its conduct had debarred itself from equitable relief herein.

CONCLUSION

The decision below is correct, and presents no conflicts. It is therefore respectfully submitted that the petition should be denied.

CHARLES FAHY,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
JOHN F. COTTER,
Attorney.

MAY 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942